Supreme Court, U.S.
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No. 09-176

IN THE
Supreme Court of the United States

LEA LAKESIDE-SCOTT,

Petitioner,

v.

MULTNOMAH COUNTY, OREGON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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I.

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I.

INTRODUCTION

Respondent Jann Brown's opposition to Lea-Lakeside-Scott's Petition numbers three arguments: (1) Scott's petition should be denied because she seeks certiorari concerning an adverse employment decision that was not presented to either the jury or to the Ninth Circuit; (2) the Ninth Circuit did nothing improper in applying the standard in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977); and (3) this Court cannot consider Scott's challenge of Brown's Mt. Healthy affirmative defense because the Ninth Circuit did not reach that issue.

For the reasons set forth below, this Court should reject Brown's opposition and grant Scott's Petition.

REPLY TO BROWN'S STATEMENT OF CASE

Brown argues that Scott's Statement of Facts includes "irrelevant and argumentative facts" regarding the speech and adverse employment actions at issue. Brief In Opposition at 1. Brown relies upon the background facts the Ninth Circuit found together with a brief summary of the evidence concerning Fuller's role in the termination process.

Brown's discussion of the facts has two over-arching flaws. The first is that Brown does not dispute

the accuracy of Scott's Statement of Facts. Thus, Brown does not dispute that Scott presented at trial evidence that County employees, both management and non-management, were using the County computer system in violation of County policy, that Scott uncovered evidence of this misconduct when she accessed the County server and that Scott was the only employee disciplined for allegedly having violated that County policy.

While Brown considers these facts irrelevant and argumentative, these facts relate directly to the both the motives of Brown and the bias of other County witnesses, such as Fuller.

The second flaw shows how Brown studiously avoids applying the proper standard in its statement of facts. The trial court denied Brown's motion for judgment as a matter of law. The denial of a motion for judgment as a matter of law is reviewed de novo. Ostad v. Oregon Health Science University, 327 F.3d 876, 881 (9th Cir.2003). The Court views the evidence in the light most favorable to the party in whose favor the jury returned the verdict and draws all reasonable inferences in the her favor. Gilbrook v. City of Westminister, 177 F.3d 839, 847 (9th Cir. 1999).

Because Brown does not contest the accuracy of Scott's Statement of Facts and because Brown does not apply the proper standard of review to her Statement of Facts, this Court should accept Scott's Statement of Facts.

II.

REPLY TO BROWN'S ARGUMENT IN OPPOSITION

Brown advances two reasons this Court should deny Scott's Petition. Brown contends that Scott is seeking review concerning an adverse employment decision which was not raised in the trial court or on appeal. Second, Brown contends the Petition should be denied because this case involves nothing more than a run-of-the mill First Amendment case in which causation failed and the Ninth Circuit did nothing more than adhere to established legal precedent.

For the reasons set forth below, both of Brown arguments opposing the Petition should be rejected.

A. Scott Litigated The Question Of Whether Brown Terminated Scott Or Caused Her Termination

Brown erroneously argues that Scott limited her § 1983 claim to the question of whether Brown made, or participated in, the decision to terminate Scott. To support her argument, Brown points first to an exchange between trial counsel and the trial court. Second, Brown cites the Ninth Circuit majority opinion for the proposition that Scott "did not argue in the district court nor in her briefs on appeal" that Brown retaliated against her by starting the investigation or placing her on administrative leave. Brief In Opposition at 5. However, the record from the trial court establishes quite the opposite of what Brown contends.

In the trial court, there was no dispute that Brown was not the person who signed papers on behalf of the County that formalized Scott's discharge. What was disputed was Brown's role in causing Scott's discharge. Scott made clear at trial that her "discharge" consisted of a process of employment decisions leading to the discharge. Scott also made clear at trial that her discharge claim challenged Brown's involvement in the entire process leading to her discharge, not simply the decision to discharge.

The colloquy Brown cites in her Opposition between counsel and the trial court is a part of a longer conversation that Brown takes out of context. The longer conversation shows that the court was discussing whether plaintiff was claiming she was retaliated against by being denied a promotion, being denied ergonomic accommodations and by being terminated. It does not show Brown was limiting her discharge claim to the question of whether Brown made, or participated in, the decision to terminate Scott as distinguished from triggering the process leading to termination.

Brown omits the longer version which shows the correct context of the colloquy and which supports Scott's argument. The longer conversation reads as follows:

> "THE COURT: . . .You've got three adverse employment actions: ergonomic denial, failure to promote and termination.
>
> MR. FISHER: Correct.

THE COURT: You've got to show that her [Scott's] speech motivated those employment actions. If ergonomic denial occurs before Jann Brown knows of the speech, it can't by way of logic motivate that particular action.

Do you have any evidence that the ergonomic denial follows the speech?

MR. FISHER: I don't think that it does. I think that that does or the promotions do. What I have maintained in this case from the beginning is that it was the act of the exercise of speech on the filing of the BOLI complaint. The content has bearing only as it would relate to the motive and the substance – *the substance and motive – substantive motive of Ms. Brown to engage in the conduct she did between October 16th and the termination date.*

THE COURT: *What employment actions do you contend postdate the protected speech*?

MR. FISHER: *The placing on leave, the charges, the investigation and the discharge.*

THE COURT: So you're not contending that any ergonomic denial or any failure to promote postdates the protected speech?

MR. FISHER: Not as a basis for liability here. I am saying they have relevance, but for the reasons that you noting, they do not follow the speech. The speech was, and I told – I argued this in summary judgment, that the *gravamen*

of this claim has been Mrs. Scott's interaction with the Bureau of Labor and Industries, and as soon as that came to bear, it triggered the entire process that resulted in the discharge. And that is the interference.

THE COURT: So you're left with the discharge as a claim for liability?

MR. FISHER: That's correct.

THE COURT: And the other events that you argue demonstrate that liability, but the main claim for liability now is only discharge.

MR. FISHER: It has always been that way, at least from the plaintiff's – that was my intention. I thought I had communicated the basis for liability under this claim throughout the case.

THE COURT: Well, then, as an initial matter, to the degree that this case has anything that would go to the jury alleging liability under this theory for ergonomic denial, failure to promote, I grant defendant's motion. It's apparently not even your theory of the case, and I find that there is no evidence to support those adverse employment actions being motivated by protected speech, since they predate it under the evidence I've heard, the protected speech.

That leaves us with retaliation, which obviously did postdate the protected speech. . ."

Excerpt from Trial Transcript pp. 302-04. Emphasis added.

Contrary to Brown's central argument, there was no discussion where Scott's counsel stated or inferred that he was limiting the claim to the decision to discharge, as distinguished from triggering the process leading to the discharge. Furthermore, Scott's counsel explicitly informed the court that the "gravamen of this claim" was that the filing of the BOLI complaint "triggered the entire process that resulted in the discharge..." Scott clearly stated that the employment decisions involved in the discharge process were "the placing on leave, the charges, the investigation and the discharge."

Scott's argument that the "gravamen of this claim" was that the BOLI complaint "triggered the entire process that resulted in the discharge..." was based on Ninth Circuit law, as well as the law in four other circuits, that a defendant may be said to have proximately caused an injury if they personally participate in the act or *by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.* Johnson v Duffy, 588 F. 2d 740, 743, 744 (9th Cir 1978). See, citations at page 19 of Petition for Writ of Certiorari.

The rulings of the court, the jury instructions and the Verdict form all show that the parties litigated whether Brown terminated Scott or *caused her termination.* Nothing limited the discharge claim to the question of whether Brown made, or participated in, the decision to discharge Scott.

For example, Jury Instruction No. 9 asked the jury to decide whether "Brown terminated plaintiff or caused her to be terminated . . ." App. 75. Similarly, Jury Instruction 10 advised the jury, "Jann Brown is prohibited from terminating or causing the termination of an employee on the basis that infringes on the employee's constitutionally protected interest in the freedom of speech." App. 75.

If Scott's claim was limited as Brown argues, there would be no reason for inserting the phrase, "...or caused her termination" in the instructions.

In addition, the first question of the Verdict form the jury completed asks, "Did plaintiff prove by a preponderance of the evidence that Jann Brown retaliated against her because she engaged in protected speech." If Scott's claim were limited as Brown suggests, the Verdict form should have simply asked if "Jann Brown terminated her because she engaged in protected speech." App. 78.

The trial court's ruling on post-trial motions further demonstrates that Brown affirmatively litigated the broader question of whether she caused Scott's termination. The trial court outlined the three elements of a *prima facie* case of First Amendment retaliation and addressed what the parties litigated as to the second element of the claim, the adverse employment action as follows:

> "Brown does not challenge the first prong. On the second prong Brown argues that plaintiff failed to establish that *she caused plaintiff's termination.* Brown argues that the fact

> plaintiff was terminated is, standing alone, insufficient to prove this prong because the evidence at trial established that Fuller made the decision to terminate plaintiff on her own."

Order on Post-Trial Motions, p. 2-4. App. 68.

Finally, Judge Berzon's concurrence shows that Scott's termination claim was much broader than Brown or the majority panel have acknowledged. Related to the scope of the discharge claim, Judge Berzon wrote:

> "In this case, the majority concludes that Brown discovered Scott's journal and reported it to Fuller while 'engaged in activities typical and appropriate for her position,' and then states that Scott does not allege that Brown 'targeted her for investigation or selectively reported her misconduct.' See id. But Scott obviously does so allege, she has maintained from the outset and the jury must have found that Brown reported her to Fuller for a retaliatory reason. The difference between targeting someone for investigation and retaliating against them by reporting them, entirely escapes me."

App 27.

Judge Berzon was correct. Scott did "maintain from the outset" Brown targeted her for investigation and the record from the trial court shows her use of this argument in the trial court was obvious.

Thus, defendants Brown's central argument for

opposing Scott's Petition is simply false.

B. The Ninth Circuit Improperly Applied the Mt. Healthy Standard.

It is significant Brown fails to address Scott's citation to Hartman et. al. v Moore, 547 U.S. 250, 164 L.Ed.2d. 441, 126 S.Ct. 1695 (2006) in any manner. If, as Brown argues in her Brief in Opposition, Scott's case is a "run-of-the mill" First Amendment retaliation case, under Hartman Scott satisfies her burden of proof through evidence of a retaliatory motive and injury. Since there is no dispute that Scott produced evidence of a retaliatory motive and an injury, the Ninth Circuit's decision necessarily conflicts with both Hartman and Mt. Healthy.

As Scott's petition raises serious issues about whether the Ninth Circuit's decision in this case conflicts with Hartman and Mt. Healthy , Brown's silence concerning Hartman can only be read as a tacit acknowledgment of Scott's argument that her burden of proof did not include a requirement of proving the final decision-maker's decision was not a legitimate one wholly independent of the subordinate manager's unlawful motive, as required by the Ninth Circuit.

Consequently, in the absence of any analysis comparing the Ninth Circuit's Opinion and Scott's Hartman citation to resolve Scott's arguments, support of Scott's petition remains unchallenged by Brown.

C. Contrary to Brown's Assertion All Three Members of the Ninth Circuit Panel Did Reach the Issue of the Mt. Healthy Affirmative Defense.

Brown contends that Scott seeks review of the concurring opinion's ruling that Brown proved an affirmative defense under the second part of the Mt. Healthy burden shifting framework. Brown contends that review on this basis is inappropriate because the majority opinion did not reach the issue of the Mt. Healthy affirmative defense.

However, contrary to Brown's position, all three judges on the Ninth Circuit panel reached the Mt. Healthy affirmative defense.

As set forth in Scott's Petition, the majority panel assigned to Scott the burden of proving that the final decision maker's decision to terminate Scott was either not legitimate or not wholly independent of the retaliatory motive. By assigning this burden of proof to Scott, the majority panel effectively imposed on the plaintiff the burden of disproving what should be an affirmative defense under Mt. Healthy. Thus, the majority panel did reach the question of the Mt. Healthy affirmative defense.

As set forth in Scott's Petition, the concurrence explicitly addressed the Mt. Healthy affirmative defense.

CONCLUSION

The Ninth Circuit's decision in this case

conflicts with this Court's decisions in Hartman and Mt. Healthy. The Ninth Circuit's newly adopted burden of proof in First Amendment retaliation cases insulates from liability subordinate managers who retaliate against employees for their protected conduct. If not reversed, the Ninth Circuit's rule will protect retaliating supervisors and thus promote unlawful retaliation in violation of the First Amendment.

This Court should grant Scott's Petition.

Dated this 26th day of October, 2009.

Respectfully submitted,

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